Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services	)	CC Docket No. 92-115

COMMENTS OF SKYTEL CORPORATION

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TABLE OF CONTENTS

SUMMARY

The Commission has proposed to revise Part 22 of the rules in order to expedite service to the public. The Commission's 931 MHz proposals would revise the way in which an entity applies for 931 MHz spectrum by requiring an applicant to specify an available frequency for which it seeks an authorization. They would change the manner in which modification and initial licensee applications are defined.

Requiring applicants to specify a frequency will not achieve the Commission's goal of reducing the number of mutually exclusive situations. Rather, it will further burden the Commission's resources and delay the provision of service to the public. The Commission's proposal would also frustrate its goal of regulatory parity and present increased opportunity for the filing of applications for a purpose other than to provide service.

Redefining what constitutes a modification application in order to change the number of applications that may be subject to auction is unnecessary, since the Act limits the types of applications that can be auctioned, and the rules already include an applicable definition. SkyTel submits that the Commission should apply existing definitions of "initial" and "modification" applications rather than redefine them.

Application of the proposed rules to all currently pending applications would constitute an impermissible retroactive application of the rules. The Commission should adopt a proposal that focuses only on mutually exclusive proceedings without needlessly involving or hindering the grant of other applications.

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SkyTel Corporation ("SkyTel"),[1/] by its attorney and pursuant to Section 1.415 of the Commission's rules, respectfully submits its comments in response to the Further Notice in the captioned proceeding.[2/]

1/ SkyTel's qualifications, and those of its corporate parent and affiliates, are well known to the Commission. SkyTel is the preeminent provider of nationwide messaging service and has been so since the inception of this service nearly a decade ago. Indeed, SkyTel and its then-parent corporation played a leading role in the design of the nationwide paging licensing system eventually adopted by the Commission. See Mobile Radio Service, 93 FCC 2d 908, 916 (1983). SkyTel's parent corporation, Mobile Telecommunication Technologies Corp. ("Mtel"), has been acknowledged as a genuine pioneer in the development of high-technology wireless service and has been awarded a nationwide narrowband PCS Pioneer's Preference as a result of its efforts. Mtel, SkyTel, and their affiliates also hold a host of other Commission licenses, including numerous SMR authorizations, multiple Public Coast Maritime authorizations, over forty Public Mobile Land Service 450 MHz air-ground authorizations, and a substantial equity interest in the American Mobile Satellite Corporation, the sole licensee in the Mobile Satellite Service. For all of these reasons, SkyTel is uniquely situated to provide the Commission with informed comment on the proposals included in this proceeding.

2/ Further Notice of Proposed Rulemaking, CC Docket No. 92-115, 59 Fed. Reg. 31186 (June 17, 1994) ("Further Notice").

I. Introduction

By these comments, SkyTel focuses on one of the two distinct issues addressed in the Further Notice: a wholesale revision in the licensing procedures governing Part 22 authorizations in the 931 MHz band.[3/] At the outset, SkyTel applauds the Commission for proposing bold changes to its licensing scheme in order to expedite service to the public. Yet, for the reasons set forth below, SkyTel submits that adoption of the rule changes as proposed in the Further Notice would serve to complicate unnecessarily 931 MHz licensing processes that have worked well over the last decade and would delay, rather than expedite, the provision of service to the public. These changes, if applied to all pending 931 MHz applications as proposed, would also constitute an unequitable and illegal retroactive application of rules to pending applications. Finally, SkyTel submits that the goals that the Commission seeks to attain in this proceeding, and the public interest generally, would be served better through alternative changes presented herein.

II. The Commission's Proposal

The Further Notice devotes a scant eight paragraphs to its discussion of two distinct proposed rule changes for 931 MHz applications. One of these would revise dramatically the way in which entities apply for 931 MHz spectrum, and the other would change the manner in which modifications and initial licensee applications are defined.

3/ SkyTel presents no comment on the proposed revisions of cellular rules also addressed in the Further Notice.

A. Proposed Requirement to Request a Specific 900 MHz Frequency

More than a decade ago, the Commission established rules governing the licensing of 931 MHz applications.[4/] With only the benefit of minor clarifications via Public Notice,[5/] those rules have withstood the test of time. The stable and time-tested nature of the rules has served to facilitate the establishment and growth of the 900 MHz paging industry.[6/] While there have been some complications associated with processing of applications, they have been truly minimal, as evidenced by the fact that only a handful of lotteries have been held over the last decade.

Notwithstanding the above, the Commission's discussion of its rules commences with a statement that "[t]hese rules no longer permit efficient processing of applications resulting in some confusion and delay....For these reasons, we propose to amend our rules in a further effort to minimize mutually exclusive applications." Further Notice, at para. 12. Significantly, the particular concern voiced by the Commission that caused it to contemplate revising its rules is a belief that "current Part 22

4/ Paging Systems-DPLMRS, 89 FCC 2d 1337 (1982).

5/ Public Notice, Mimeo No. 4395 (Com. Car. Bur., May 24, 1984).

6/ To the extent that current procedures may not best serve the public interest, it is due to the considerable time lag between the time an application is filed and when it is granted. As set forth herein, however, the changes proposed by the Commission would add to that delay. Contrast the stability of the Commission's 900 MHz paging rules with its cellular rules, which have undergone countless revisions during that same period.

rules may not provide sufficient guidance to inform applicants when 931 MHz spectrum that becomes available will be available for assignment to already pending applications". Further Notice, at para. 15. Based upon that concern, the Commission proposed to revise its rules and to apply such rules to all pending and future applications. Id.[7/]

Specifically, the Commission proposed that all 931 MHz applicants must specify the frequency for which they seek authorization, and that the frequency specified "must be available" at the time the application is filed. Applications or amendments specifying a 931 MHz frequency would then be placed on Public Notice, and "mutually exclusive applications received within 30 days would be considered as one processing group" and subjected to competitive bidding.

B. The Redefinition of What Constitutes a Modification Application

The Commission also proposed to redefine what constitutes "initial" and "modification" applications in the context of 931 MHz paging. In this regard, the Commission proposed to consider the following to be an initial application: (1) an application anywhere on a new frequency and (2) a proposal to locate a new facility more than two kilometers (1.6 miles) from any existing facility operating on the same frequency. Further Notice, at para.

7/ "Pending applications" were defined broadly to include "applications that have been granted, denied or dismissed and are the subject of petitions for reconsideration or application for review." Id.

18. A 931 MHz paging application would be considered a modification of an existing system only if (1) it proposed new locations 2 kilometers (1.6 miles) or less from a previously authorized and fully operational base station licensed to the same licensee operating on the same frequency; (2) the application were for a change of location within 2 kilometers (1.6 miles) of an existing station licensed to the same licensee on the same frequency; or (3) the application proposed a technical change that would not increase the service contour. Id.

III. A Requirement That All 931 MHz Applicants Specify a Frequency Would Not Serve The Public Interest

Even accepting as accurate the Commission's understanding of the status of 931 MHz application processing, i.e., that there are too many mutually exclusive ("MX") situations, the public interest would not be served by requiring all 931 MHz applicants to specify a frequency, for several reasons.

A. Specifying a Frequency Will Not Reduce the Number of Mutually Exclusive Situations

The Commission envisions the proposed rule changes as "a further effort to minimize mutually exclusive applications". Further Notice, at para. 12. While SkyTel applauds the Commission's intent, it submits that there is nothing in its proposal that serves to accomplish that goal. The fact of the matter is that in the future MX filings would be fewer if, as is

the case now, the Commission has authority to shift[8/] one or more applicants away from a given frequency when other 931 MHz frequencies are available in the same general area. Under the proposed rule, if multiple applicants either deliberately or coincidentally file for the same frequency when multiple frequencies were available, there would be mutual exclusivity where none now exists. Thus, there is no reason to believe the Commission's proposal will help achieve its goal.

B. A Requirement that an Applicant Specify a 931 MHz Frequency Will Burden the Commission's Resources and Delay the Provision of Service to the Public

Under the Commission's proposal, all new and pending applicants must specify a frequency. Further Notice at paras. 16 and 17. If adopted, each of the approximately 1,000 pending 931 MHz applications would have to be amended. Each would then have to be placed on Public Notice as accepted for filing, for a second time.[9/] Then, each would have to sit for at least 30 days[10/]

8/ It is most noteworthy that there has been little or no controversy regarding how the staff has determined which of several applicants requesting a preference for a given frequency should be moved to another frequency. This lack of controversy speaks well of the staff's ability to resolve potentially complicated matters and argues against the need to implement a wholesale revision of the rules at this time.

9/ Staff resources necessary to accomplish all of this will not be inconsiderable, and effort devoted to these projects will necessarily detract from resources that would otherwise be devoted to other applications.

10/ The Further Notice, at para. 16, speaks of a 30-day period after Public Notice in order for a competing application to be in the same "processing group," and, presumably, only those (continued...)

simply in order to permit the Commission to assess whether any mutually exclusive applications were filed. This process would likely extend the current wait for grants by several months and most certainly would not expedite action on the applications.

In the case of future filings, the considerable additional delay discussed above may be only "the tip of the iceberg" where MX filings are made. Fortunately, cases of "inadvertent" MX filings can be resolved by further amendment. See Section 22.23(g)(2). But those further amendments will necessitate a further Public Notice, even though no new applicants will have an opportunity to file competing applications. Section 22.23(g)(2); Section 22.23(c)(1)(i). All of this will add further delay without any corresponding benefit.

If the MX filings are not inadvertent, or otherwise are not eliminated by the parties, either auctions or legal challenges may well ensue.[11/] The particulars associated with auctions for 931

10/ (...continued)
applicants that are in the same "processing group" will be deemed to be mutually exclusive. Yet the current rules provide a 60-day period for the filing of mutually exclusive applications. See Section 22.31(b)(2)(i). Thus, the actual delay may be even longer than discussed above or than contemplated by the Commission.

11/ If any of the applications that might be placed in an auction as a result of being agreed to be MX was filed before July 26, 1993, a question will exist as to whether licensing by auction is appropriate. See Section 1.002(c) of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"). Even where all applications are filed after July 26, 1993, an auction will be appropriate only after analysis of a multitude of factors set forth in Section 309 (j)(3) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(j)(3) (the "Act").

MHz frequencies have not yet been established, but the Commission's general policy is that 75 days' prior notice will be given for an auction.[12/] This alone will add several months to an already too-long processing time frame.

All of the above delay is bad enough as a general matter, especially in view of the mandate in Section 1 of the Act to "make available to all the people...a rapid, efficient wire and communication service...." 47 U.S.C. Section 1, and the absence of any significant counterbalancing benefits. But it is even more disturbing in view of the Commission's stated purpose in this proceeding to "ensure that licensees...provide service to the public as expeditiously as possible." Further Notice at para. 1.

C. The Commission's Proposal Would Frustrate Regulatory Parity

Grant of the Commission's proposal would present an obstacle to the Commission's goal of creating regulatory parity among common carrier and private radio mobile services providers, and would frustrate the creation of a level playing field for carriers licensed in the different services.

Private Radio Bureau rules provides for frequency "exclusivity" to qualified Private Carrier Paging ("PCP") operators of local, regional and nationwide 929-930 MHz paging systems.[13/]

12/ Second Report and Order in PP Docket No. 93-253, 59 Fed. Reg. 22980 (May 4, 1994), 47 C.F.R. 90.495.

13/ See Report and Order in PR Docket No. 93-35, 8 FCC Rcd 8318 (1993).

By allowing these private radio carriers exclusivity of frequency use for their respective systems, no other applicants can apply for those frequencies.

The private radio operators which have obtained exclusivity would have an enormous competitive advantage over their common carrier counterparts, such as SkyTel, if their competitors were afforded an added opportunity to MX expanding system applications. PCPs are now free to design and construct their systems on their assigned frequencies without concern that other MX applications could be filed thus frustrating their plans for enhancement and growth of their systems. Likewise, those private radio providers are not forced to file their applications prematurely in areas of possible planned expansion in order to prevent strike filings from competitors.

D. Specifying a Frequency Would Present Increased Opportunity for Strike Filings

In recent years, the Commission has been largely free of strike[14/] filings.[15/] This positive development has not-coincidentally come about at the same time that the interest of the paging community has largely shifted to 900 MHz. One significant

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14/ A strike application is an application filed for a purpose other than to provide service. See Grenco et al. , 28 FCC 2d 166 (1971). Most often such filings are designed to impede or delay expansion of quality coverage by one applicant in order to afford a strategic or competitive advantage to the strike applicant.

15/ This is not to say that the 900 MHz band has been free of chicanery, but only that it involves matters unrelated to the Commission's proposal. See, e.g., Southland Holdings, Inc., 9 FCC Rcd 1961 (Com. Car. Bur. 1994).

contributing factor here is that, under current 931 MHz application rules, it is virtually impossible for one carrier intentionally to MX another in most markets. It is thus not surprising that, where recent argument has been raised over strike applications, it has been raised in other bands.[16/]

If the Commission's proposed rules are adopted, they would provide renewed and expanded opportunity for strike applicants. Two examples vividly illustrate this problem. First, any time that an applicant seeks to expand its service area around a major market, a competitor could delay or otherwise impede that effort simply by filing a 931 MHz application specifying the same frequency. Similarly, if an applicant sought to utilize a common 931 MHz frequency for service over a large region, or even nationwide, a competitor could frustrate that legitimate strategy simply by filing MX applications for that same frequency. Significantly, even if the strike applicant in either of the above scenarios eventually elects not to continue prosecuting its application, its purpose would be well served by delay in the interim.

SkyTel is cognizant that current precedent already precludes strike applications.[17/] But SkyTel also appreciates that strike application cases often involve extensive factual analysis, and

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16/ See, e.g., Larry D. Ruddell, File No. 28455-CD-P-92, recon. pend., where the Mobile Services Division ("MSD") granted an application despite there being a considerable showing that it was a strike application.

17/ See Grenco, supra.

that the Commission simply lacks the staff resources necessary to police this form of abuse.[18/] Moreover, at least one recent MSD action appears to have established some precedent that may make strike applications more, rather than less, difficult to prove.[19/] In any event, SkyTel submits that it makes no sense to expand needlessly the areas that the staff must police with its scant resources, especially when there is no corresponding benefit from so doing.

18/ SkyTel was unable to locate a single published decision in the last decade holding that a strike application was filed, or even addressing strike application issues. SkyTel respectfully submits that during that time some strike applications were filed.

19/ Ruddell, supra, illustrates this in at least two ways. There, an applicant was permitted to MX another applicant which filed to expand service on its existing frequency, despite the availability of many other frequencies that would have afforded the alleged strike applicant far superior coverage. The strike applicant's sole explanation for its frequency selection, which explanation the staff accepted over extended argument, was that it chose the particular frequency at issue because it sought to enter into a joint venture arrangement with the first applicant, even though the two parties had never met or in any way discussed this matter. With the staff having ruled that a professed desire to force a joint venture arrangement upon another applicant is a legitimate basis for filing an MX application, the doors appear to be wide open for strike filings.

The Ruddell proceeding constitutes ominous precedent for yet another reason: a considerable showing was made that the applicant in that proceeding was a mere front for another competitor in the market where the applications at issue were filed, yet no real party issue was investigated in any depth. SkyTel appreciates that the lack of investigation may well reflect the severe limits in staff resources. Nevertheless, the Ruddell proceeding does establish harmful precedent and may encourage other would-be strike applicants to use fronts for such filings.

IV. The Commission Should Not Redefine What Constitutes A Modification Application

A. The Act Limits the Types of Applications that Can Be Auctioned

In the Further Notice, the FCC properly observed that, pursuant to the Budget Act, the Commission can use competitive bidding procedures only to select among mutually exclusive applications for an "initial license". Further Notice, at para. 18. The Commission also observed that in its Second Report and Order in PP Docket No. 93-253, supra, at para. 38, the Commission determined that it would regard MX applications to modify existing licenses as not being subject to auctions. Id.[20/]

The restrictions on the Commission's auction authority, which limits the applications that may be subject to competitive bidding are more clearly set forth in the Act itself and in its legislative history. Section 309(j)(1) unambiguously provides only that auctions may be utilized "[i]f mutually exclusive applications are accepted for filing for any initial license or construction permit...." 47 U.S.C. §309(j)(1).

The legislative history of Section 309(j)(1) adds further insight to this issue. It provides:

> The authority would apply only when there are mutually exclusive applications for an initial license for a use described in subsection 309(j)(2). Competitive bidding would not be permitted to be used for unlicensed uses; in situations where there is only one application

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20/ The Commission also noted that it had left open the possibility of treating some modification applications as initial applications. Id.

> for a license; or in the case of for a renewal or modification of the license.

H.R. Rep. No. 103-111 at 253.

B. The Commission Should Apply Existing Definitions, Rather Than Redefine Terms In Order To Increase the Number of Applications that Can Be Auctioned

The Commission appears to recognize that it simply cannot include modification applications in auctions. Further Notice, at para. 18. Yet, in assessing which 931 MHz applications can be included in auctions, the Commission elected not to utilize traditional definitions of modification and initial applications, but rather to define these terms anew. See Section IIIB, supra, where the proposed new definitions are set forth. SkyTel submits that since definitions of "modification" applications in the 931 MHz band already exist, those definitions should be applied, rather than be revised, in order to permit more applications to be included in auctions.

From the initiation of the 931 MHz paging service, the Commission has recognized that 931 MHz carriers will often seek to utilize multiple frequencies at multiple locations.[21/] The Commission also recognized the fundamental differences between applications for "initial" systems and those where existing licensees seek to expand facilities, and has established different rules to govern these different types of filings. Id., at 1349-1357. Those differences, and the associated definitions of what

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21/ See Paging Systems-DPLMRS, supra, generally.

constitutes "initial" and modification applications are codified in the Commission's rules. Section 22.525(b) of the rules provides that

> an existing 900 MHz licensee requesting a one-way frequency will be deemed to be requesting an additional frequency if its proposed base station is less than 64 kilometers (40 miles) from its existing 900 MHz base station.

47 C.F.R. §22.525(b).

The staff recognizes and applies this definition of system modification in its processing of applications generally and by assigning the same station call sign to facilities that comply with this definition of "system modification". The Commission further recognizes this definition by virtue of its policy of not permitting carriers to combine facilities under a given call sign (and thus be viewed as system modifications) when they do not comply with this definition.

SkyTel submits that, in view of the fact that there currently exist definitions of "initial" and "modification" applications, there is no need for the Commission to redefine these terms. Indeed, because Congress specifically determined on August 10, 1993, that modifications should not be the subject of auctions, the Commission should apply the definitions then in effect. Clearly, Congress did not determine that modification applications may not be subjected to auction only to have the Commission undermine its mandate by changing substantially the definition of "initial" and "modification" applications.

V. Application of the Proposed Rules to All Currently Pending Applications Would Constitute an Impermissible Retroactive Application of the Rules

There is no question but that Congress, in enacting the Budget Act,[22/] the federal courts, in promulgating numerous decisions addressing this issue, and the Commission itself in other recent proceedings have all expressed a keen wariness of retroactive application of rules. Congress's concern regarding retroactivity is evidenced clearly by the fact that the statute itself establishes the date on which the legislation was enacted as a pivotal cut-over date for determinations regarding FCC licensing. See Section 6002(c).

The Supreme Court long ago addressed the issue of retroactive enforcement of newly promulgated rules or law. It established the overriding criterion that retroactive application is improper if "the ill effect of the retroactive application" of the rule outweighs the "mischief" that would result from frustrating the interest that the new rule promotes. SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).[23/] More recently, the Supreme Court has

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22/ The Omnibus Budget Reconciliation Act of 1993, amending 47 U.S.C. 309 et seq.

23/ See also Retail, Wholesale, and Dep't Store Union v. NLRB, 466 F.2d 380, 389-390 (D.C. Cir. 1972) ("Retail Union") and Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1554-55 (D.C. Cir. 1987), where the D.C. Circuit recognized the governing applicability of the Chenery test. Were the Chenery test to be applied to the instant proposed rule changes, they could not be applied retroactively, for the proposed changes (a) are abrupt departures from existing rules, and (b) present significant burdens to an applicant who relied on existing

(continued...)

effectively created a presumption against retroactive rulemaking. See Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988)[24]; 1 K. Davis & R. Pierce, Administrative Law Treatise, §6.6 at 257-60 (3d ed. 1994). The fact that the law so clearly disfavors retroactive rules, see Bowen, 488 U.S. at 208,[25] should itself cause the Commission not to apply auction rules retroactively to mutually exclusive cellular applications. This is particularly so where, as here, far less drastic options, such as prospective application or limited retroactive application, would serve to accommodate the Commission's needs. See Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737 (D.C. Cir. 1986).

The Commission itself has also recognized the evils inherent in retroactive application of rules. In its decision in ET Docket No. 93-266, the Commission concluded that "it would be inequitable to apply any changes in our rules to pending proceedings in which Tentative Decisions have been issued." First Report and Order in ET Docket No. 93-266, 9 FCC Rcd 605, 610 (1994). Most significantly, the Commission reasoned that "parties have expended

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[23] (...continued)
rules when filing applications, without providing any counterbalancing benefits.

[24] In Bowen, the Court made clear that a statutory grant of legislative rulemaking authority will not, as a general matter, serve as authority to promulgate retroactive rules unless such power is conveyed by Congress in expressed terms.

[25] Other recent Supreme Court cases serve only to bolster this position. See, e.g., Landgraf v. U.S.I. Film Products, 114 S.Ct. 1483 (1994) and Rivers v. Roadway Express, Inc., 114 S.Ct. 1510 (1994).

not inconsiderable resources....Had the rules been different, these applicants might have structured their requests differently." Id.[26]

SkyTel submits that adherence to Congressional mandate, respect for controlling precedent, and consistency with other of its own actions all require that the Commission not change at this late date the "rules of the game" governing all 931 MHz applications currently on file.

VI. The Commission Should Adopt a Proposal That Focuses on MX Proceedings Without Needlessly Involving Other Applications

The Commission's proposal to require all 931 MHz applicants to specify a particular frequency appears to be designed to address, and help resolve, complicated MX situations such as now exist in the northeast corridor. There, a considerable number of applicants is at least arguably MX'ed, with controversy surrounding who is MX'ed and how the situation should be resolved.

SkyTel submits that situations such as the northeast corridor MX situation are sufficiently rare, and sufficiently complicated, that attempted cures for such proceedings should be tailored specifically to the proceedings at issue and need not be applied "across the board" to all 931 MHz applications. In a situation such as exists in the northeast corridor, the Commission should

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[26] The Commission had previously decided that it would be inequitable to apply competitive bidding rules to Pioneer's Preferences awarded for narrowband PCS services. See Notice of Proposed Rulemaking in ET Docket No. 93-266, 8 FCC Rcd 7692, 7694-95 and n.19 (1993).

adopt rules that would permit it to issue a Public Notice listing all parties that the Commission deems to be tied up in that proceeding. The same Public Notice should further identify those frequencies that the Commission deems to be "available for filing" and direct the applicants to amend their applications to specify a particular frequency. Once the amendments are received, the Commission should be able to generate promptly a listing of all applications that are deemed to be mutually exclusive.

Were the Commission to adopt such a policy in this notice and comment rulemaking proceeding, there would be no question but that parties would have proper notice of the rules that would govern their applications. Moreover, retroactivity associated with the proposal would be sufficiently limited so as to pass judicial scrutiny. See Yakima Valley, supra. Finally, the Commission's existing authority to request additional information, set forth in Section 22.20(d) of the Commission's rules, would serve to bolster this method for resolving mutual exclusivity.

SkyTel submits that the proposal set forth herein would bring with it all the benefits associated with the Commission's far broader proposal, without incurring many of the costs associated therewith.

VII. Conclusion

There is nothing in the record to demonstrate that the public would benefit from either component of the Commission's proposal for 931 MHz applications. The proposal to require applicants to specify a particular 900 MHz frequency would delay processing,

increase the number of MX applications, and provide an opportunity for strike filings. The proposed redefinitions of "initial" and "modification" applications appear to violate Congressional mandates on this subject. Retroactive application of the proposed rules would only further complicate the situation and would be both unfair and improper.

For all of the above reasons, SkyTel urges the Commission to abandon its proposals and, instead, to use existing industry proposals as a framework for facilitating licensing.

Respectfully submitted,

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